No. 12,231

IN THE

United States Court of Appeals

For the Ninth Circuit

ALASKA AIRLINES (an Alaska Corporation),

Appellant,

vs.

ARTHUR J. OSZMAN,

Appellee.

Upon Appeal from the District Court of the United States for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

J. L. McCARREY, JR.,
Anchorage, Alaska,
Attorney for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 12,231

IN THE

United States Court of Appeals

For the Ninth Circuit

ALASKA AIRLINES (an Alaska Corporation),

Appellant,

vs.

ARTHUR J. OSZMAN,

Appellee.

Upon Appeal from the District Court of the United States for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

STATEMENT OF THE CASE.

The Appellee accepts the jurisdictional statement of Appellant. Appellee generally accepts the statement of the case submitted by the Appellant and admits that such statement of the case fairly presents the views and circumstances which give rise to the questions presented in this appeal.

THE EVIDENCE.

As is set forth in Appellant's statement, the Appellee went to work for the Appellant on or about the 4th or 5th day of May, 1944, (T.R. 26) as Operations Manager of the company, to be based at Juneau, Alaska, and the Appellee testified that he was to be reimbursed for his transporation from Minneapolis to Anchorage after he had been working in the employ of the Appellant for a period of six months (T. R. 27). The Appellee further testified that he stayed in the employ of the Appellant for a period in excess of thirteen months (T.R. 28) and on rebuttal the Appellee testified that between the 15th and 20th day of June, 1945, or prior to his first termination of employment with the Appellant, that he submitted detailed expenses set out in recap sheets to the then president, T. N. Law, (T.R. 178) at which time the Appellee testified that the then president, Mr. T. N. Law, asked Mr. Hedman "to give it his immediate attention, as they were, in his opinion, long overdue and would appreciate having mine balanced out", (T. R. 179). The Appellee further testified on rebuttal that other detail sheets submitted for the months of February and March, 1947, were "very much in detail, itemized, each expenditure on the day which they occurred", (T.R. 179). This, the Appellee testified to after he had been asked the following question, "Were those detail sheets, I will ask you, similar in nature to the two detail sheets you submitted for February and March in Seattle?" (T.R. 179).

None of the foregoing testimony of the Appellee was denied by the Appellant, nor was there any proof submitted at the trial to rebut the same. And, as a matter of fact, the Appellant's witness, Joseph E. Griffin, admitted that he would have paid part of the expenses for the months of February and March of the year, 1949, as he felt that they were "legitimate expenses and we would pay it" (T.R. 167).

In reviewing the transcript of record in its entirety, the Appellant did not introduce any evidence nor any witnesses to disprove Appellee's claim against the Appellant, other than a general denial set up in the answer by the Appellant, and the testimony of the Appellant's only witness, Joseph E. Griffin, who testified that there was no account payable to the Appellee on the books of the corporate Appellant, at any time (T.R. 162). Yet, the same witness did not come into the employ of the Appellant until the 4th day of February, 1946 (T.R. 160) or until nine months after the Appellee had been in the employ of the Appellant.

A thorough study and investigation of the evidence and proof submitted by the Appellant does not disclose that the Appellant produced any evidence, either documentary or by witnesses, to prove that the Appellee had been paid for the expenses incurred by the Appellee in the normal course of his employment as Operations Manager, and it is the opinion of the Appellee that had a motion been made for a directed verdict after the Appellant had rested his case that the court would have granted and ordered a directed

verdict, because the Appellant did not deny that it owed money, but contended only that there was no account payable to Appellee set up on the books at that time (T.R. 162).

ARGUMENT.

I. THE COURT PROPERLY REFUSED TO INSTRUCT THE JURY, IN THE TERMS REQUESTED BY THE APPELLANT, CONCERNING APPELLEE'S ALLEGED DELAY IN SUBMITTING HIS CLAIM.

As is indicated by the statement of the case the Appellee sued the Appellant for money expended by the Appellee for the use and benefit of the Appellant, and Appellee submitted proof of recurring demand for payment, not denied by the Appellant, except insofar that no account payable appeared on Appellant's books which were, admittedly, in poor condition.

Assuming in fact that a material issue was formed, it was properly within the province of the trial court to refuse to charge as requested by Appellant that:

> "In this case there has been conflicting testimony as to whether or not the *plaintiff* made prompt demands for the payment of the amounts which *he* claims. You are instructed that the fact that the *plaintiff* may have suffered a long period of time to elapse without making demand or bringing suit for the alleged items of indebtedness for which *he* now sues, is susceptible of various explanations consistent with *his* theory of the justness of his claim, and it is for you to say whether or not the *plaintiff* has offered one that is satisfactory or not. (Emphasis supplied).

It suffices to point out that the defendant is not mentioned in the proposed instruction and the conduct of the plaintiff is stressed. The trial court properly denied the requested instruction because the instruction singled out the sole testimony and sole conduct of plaintiff, and in addition emphasized one element of evidence which would mislead the jury. *Greene v. Donner,* 198 Wis. 122, 223 N.W. 427, (Sup. Ct. Wis. 1929).

The partial vice of the proposed instruction is set forth by the court in *Landrum v. St. Louis & S. F. R. Co.,* 132 Mo. A. 717, 112 S.W. 1000 (K.C. Ct. of App. 1908) at p. 1001:

> "The defendant asked the following instruction which the court refused to give, which action of the court is assigned as error, to wit: 'The court instructs the jury that in passing on this case and the evidence, they may consider, with all the other facts and circumstances in evidence, the fact that plaintiff requested defendant's station agent not to report the accident, and the fact that plaintiff made no claim against defendant on account of her alleged injuries for over a year thereafter, as bearing on the question of the manner in which her injuries were received'. This instruction is an example where certain facts are singled out for the consideration of the jury, and therefore given special importance over other facts of equal or greater importance. It is sufficient to say that no instances can be found where such a practice has not been condemned by the appellate courts of this state."

The proposition stated in the *Landrum* case is not an isolated instance of the rule. The courts have consistently ruled that the selective stress of certain evidence by the trial court in its instructions to the jury may be so unfair to the Appellee, and so violative of the reasonable discretion of the trial court, that the instruction may constitute reversible error. *Maryland Casualty Co. v. Dunlap,* 68 F. (2d) 289 (CCA 1st 1933).

Again, in a case concerning a disputed contract which raised similar problems, on appeal, of alleged delay of claim, the court declared:

> "Plaintiff claimed pay for certain extras. The defendant gave evidence tending to show that the cost of these was not charged upon the plaintiff's books of accounts until the controversy arose over the contract, and that it demanded only the balance of the contract price. Error is assigned upon the refusal of the court to instruct the jury that they should consider these facts in determining whether the alleged extras were or were not included in the contract. It is not good practice for the trial judge to select a portion of the testimony and give it prominence by instructing the jury that they should consider it. If the trial judge undertakes to refer to the evidence bearing upon a disputed point, he should carefully state it all on both sides. This request was faulty in calling attention to only one part of the evidence. It was not error to refuse it. The judge instructed the jury that, if they believed the testimony, on the part of the defendant, these items were included in the contract and plaintiff

could not recover; but if they believed the testimony on the part of the plaintiff, they were not included in the contract, and the plaintiff could recover for them. No error is assigned upon this instruction. It submitted to the jury all the evidence on the question."

McKinnon Boiler & Machine Co. v. Central Michigan Land Co., 156 Mich. 11, 120 N.W. 26, at p. 28, (Sup. Ct. Mich. 1909).

The trial court in the instant case submitted to the jury all the evidence on the question. Moreover, in refusing to charge as requested by appellant, the court adhered to the traditional general rule governing instructions to the jury that where under the general instructions the jury must have known that all the evidence on the subject was to be considered in determining the issue, an instruction that the jury, in determining the issue, should consider specified evidence together with other evidence is improper, as singling out a portion of the evidence and as specially directing that it be considered.

Still v. San Francisco & N.W. Ry. Co., 154 Cal. 559, 20 LRA (N.S.) 322, 98 Pac. 672 (Sup. Ct. Cal. 1908).

In this respect a passing salute is due to the authorities cited by Appellant. Except for the authorities specifically hereafter mentioned all the cases cited by Appellant are authority only for the proposition that the evidence which the appellant requested to be charged is normally admissible at the trial, and

such evidence when properly admitted at the trial is not to be denied to the jury by a specific instruction of the trial court to the jury to exclude the evidence from its deliberations. *Shadock v. Alpine Plank-Road Co.,* 79 Mich. 7, 44 N.W. 158 (Sup. Ct. Mich. 1889). *The trial court in the instant case, did admit the evidence of the alleged delay, and did not direct the jury to exclude such evidence from its deliberation.* The evidence was included in the general charge.

Appellant cites the decision of *Walker v. Harvey,* 108 Fed. 741, (CCA 3rd 1901) as authority for the proposition that the trial court was required to direct the attention of the jury specifically to the alleged delay in making claim. In that case the delay was for six years, and "unusual"; the appellate court on reviewing the whole case and the whole instruction declared, indecisively, that "we cannot say that any error was committed". The evidence of the delay in making claim in the case of *Hubenthal v. Gibbons,* 168 Iowa 630, 150 N.W. 1067 (Sup. Ct. Iowa 1915), cited by Appellant, was so unusual, under all the circumstances, that it shocked the conscience of the appellate court. The appellate court stated, at page 1068,

> "No explanation is given of the silence of 27 years".

II. THE COURT PROPERLY REFUSED TO INSTRUCT THE JURY, IN THE TERMS REQUESTED BY APPELLANT, THAT THE PLAINTIFF'S DELAY IN SUBMITTING HIS CLAIM COULD BE CONSIDERED BY THEM IN WEIGHING HIS CREDIBILITY.

It was properly within the province of the trial court to refuse to charge as requested by Appellant that:

> "In this case there is conflicting testimony on the part of the plaintiff and the defendant. The credibility of the witnesses is a matter which it is within your province to determine. You are instructed that the fact that the plaintiff may have suffered a long period of time to elapse without making demand or bringing suit for the alleged items of indebtedness for which he sues is a matter which may be considered by you in passing upon the credibility of the plaintiff".

In refusing to so charge the trial court adhered to the rule concerning instructions on credibility set down by the court in *Fleming v. Husted,* (CCA 8th 1947), 164 F. (2d) 65, at p. 70 (certiorari denied, 68 Sup. Ct. 661, 333 U.S. 843):

> "The portion which the court refused to give was an attempt to single out and place emphasis in the jury's mind upon plaintiff's previous statements and the circumstances and testimony corroborative of them, with an implied minimizing of the consideration to which his conflicting testimony on the trial was entitled. *It is not error to refuse to give a requested instruction which singles out for special emphasis part of the evidence upon a question that the jury is to decide.*

Rio Grande Western R. Co. v. Leak, 163 U.S. 280, 288, 16 S. Ct. 1020, 41 L. Ed. 160. *Situations may exist where it is permissible for the court to give such an instruction, but even then the matter is entirely one for the trial court's discretion.* The court's instructions here properly made general reference to plaintiff's previous statements and correctly advised the jury that 'you should carefully consider and weigh all the evidence in the case and return such verdict as your conscience will approve, based alone on the evidence and these instructions and free from influence, bias, prejudice or sympathy." (Emphasis supplied).

In a similar request for instruction in an action based on breach of warranty, the trial court, in *W. T. Adams Mach. Co. v. Turner,* 162 Ala. 351, 50 So. 308 (Sup. Ct. Ala. 1909), refused to charge as "Special Charge 2" that,

"It is the duty of the jury to look at the time when the plaintiff made complaint to the defendant to determine whether any defect existed in the engine and boiler at the time the defendant sold the engine and the boiler to the plaintiff."

The appellate court comments tersely:

"Special Charge 2 refused to defendant was properly so treated. It probably has other vices; but it will suffice to note that it undertakes to select and emphasize one element of fact in the evidence."

Accord: *Campbell v. Bates,* 143 Ala. 338, 39 So. 144, (Sup. Ct. Ala. 1905).

In the instant case the trial court gave a general charge to the jury on the credibility of the witnesses and the evidence but those portions should not be separated from the warp and the woof of the whole charge. No attempt can be made here to scrutinize separate passages or portions of the trial court's charge apart from their context as isolated verbal phenomena. Considered as a whole, the instructions of the court fairly and substantially presented to the jury the issues to be decided, and the judgment should not be disturbed on appeal.

Goodyear Fabric Corp. v. Hirss, 169 F. (2d) 115 (CCA 1st 1948);

Missouri, K. & T. Ry. Co. v. Jackson, 174 F. (2d) 297 (CCA 10th 1949);

Rowe v. Dixon, 196 P. (2d) 327 (Sup. Ct. Wash. 1948).

CONCLUSION.

The trial court properly refused to instruct the jury, in the terms requested, on the question of plaintiff's alleged delay in submitting his claim because it singled out the sole testimony and sole conduct of plaintiff and thereby emphasized a minor and immaterial element of evidence which would have misled the jury in its deliberations.

Moreover, the instructions, as a whole, fairly and substantially presented to the jury the issues of the

case within the reasonable discretion of the trial court and the verdict should not be disturbed on appeal.

The judgment appealed from should be affirmed.

Dated, Anchorage, Alaska,
November 18, 1949.

Respectfully submitted,
J. L. McCarrey, Jr.,
Attorney for Appellee.